APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

No. 02-1432, 02-1466
May 12, 2003

DR. SAKHARAM D. MAHURKAR,
Plaintiff-Appellant,

v.

C.R. BARD, INC.,
Defendant,

v.

NIRO, SCAVONE, HALLER, & NIRO,
Movant-Cross Appellant.

On Appeal from the United States
District Court, Northern District of Illinois,
96-CV-1871.

Before MAYER, Chief Judge, MICHEL and RADER, Circuit Judges.

Judgment

PER CURIAM.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED. See Fed. Cir. R. 36.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No.96 C 1871, No. 92 C 4803

DR. SAKHARAM D. MAHURKAR,
Plaintiff,

v.

C.R. BARD, INC.,
Defendant.

DR. SAKHARAM D. MAHURKAR,
Plaintiff,

v.

C.R. BARD, INC., D/B/A DAVOL,
Defendant.

May 10, 2002, Decided
May 10, 2002, Filed

James B. Zagel, United States District Judge.

REVISED MEMORANDUM OPINION AND ORDER

Questions of who said what when have played an important role in the disputes between Dr. Sakharam D. Mahurkar and C.R. Bard, Inc. ("Bard") over whether Dr. Mahurkar settled his patent infringement dispute with Bard. The same or similar questions plague the lawsuit now pending in state court between Raymond P. Niro and the law

firm of Niro, Scavone, Haller & Niro (together, "Niro") and Dr. Mahurkar. The parties are before me now on Niro's motion to enjoin further proceedings by Dr. Mahurkar inconsistent with this Court's July 10, 1997 judgment.

The parties have strong feelings about the dispute between them and, as I remarked on April 11, 2002, their briefs on this matter reflect that emotion. The exercise of that emotion at times complicated and clouded the issue. So, in my April 11, 2002 order, I did two things to help focus the issues. I cleared away what I called "underbrush," that is, I ruled that the procedural arguments against Niro fail and its motion is timely brought.[1] I also indicated that some form of injunctive relief is appropriate [2]—what is evident from Niro's brief, but not from the title of its motion, is that Niro seeks to enjoin Dr. Mahurkar from taking certain positions in the state court action but is not trying to enjoin the state court action in its entirety—and, to that end, ordered further briefing to determine the scope of that relief. Specifically, the questions to be answered are what Dr. Mahurkar actually wants to say in the state court proceeding and whether what he wants to say is precluded by the factual findings I made in 1997.[3]

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[1] There is no question that I have jurisdiction in this matter pursuant to the Anti-Injunction Act, 28 U.S.C. §2283, which permits a district court to enjoin a state court proceeding to "protect or effectuate its judgments." *See, e.g., Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981).

[2] There is no prohibition on non-mutual issue preclusion in the Anti-Injunction Act and, accordingly, this does not prevent Niro from seeking its injunction. Although the injunction would be in favor of Niro, who was not a party to *Mahurkar v. Bard*, what matters is that Dr. Mahurkar was a party in that action.

[3] I do not find persuasive Niro's argument that the entire claim is precluded and, accordingly, will focus on whether particular issues are precluded.

In order that an issue be precluded from litigation in a state proceeding, it must actually have been decided by the federal court. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 100 L. Ed. 2d 127, 108 S. Ct. 1684 (1988). Further, it must be based on what the court actually said and not on what it intended to say. *Id.* at 146 (discussing *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970)). Finally, it is limited to that which is "necessary to effectuate" the court's judgment. 486 U.S. at 145. So, the relevant inquiry turns on whether an issue was "actually and necessarily determined" by this Court in my oral ruling on June 19, 1997 and the Judgment Order docketed on July 17, 1997 (the "1997 Rulings").

This inquiry begins with a determination of what Dr. Mahurkar is planning to say in the state court proceedings. In Dr. Mahurkar's own words, "the gravamen of [his] claim is not the lack of a settlement with Bard, but rather the fact that Bard would not have realized settlement had been achieved and sought to enforce the settlement but for Niro's wrongdoing." To this end, Dr. Mahurkar plans to assert that Niro (1) "tipped" Bard's attorney, Mr. Grimm, to an argument that the case had settled, which caused Bard to file its motion to enforce the settlement, (2) drafted a brief for Mr. Grimm to use against Dr. Mahurkar in enforcing the settlement, (3) otherwise engineered or orchestrated enforcement of the settlement and (4) spoilated evidence. Further, Dr. Mahurkar plans to advance the theory that he is entitled to seek attorneys' fees and enhanced damages because he would have been awarded them had the settlement not been enforced (which is obviously a matter of some speculation).

As a general matter, an issue that was "actually and necessarily determined" by this Court is that Dr. Mahurkar in June 1996 had reached a settlement with Bard of two lawsuits (Nos. 92 C 4803 and 96 C 1871). It was also "actually and necessarily determined" that Dr. Mahurkar gave Mr. Niro

authority to enter into the settlement and gave written approval over the terms of the deal. In Dr. Mahurkar's own words, which I quoted then as now, "I signed it. I settled it. There is no question about authorizing the attorney." Accordingly, Dr. Mahurkar is precluded from claiming in the state court proceedings that Dr. Mahurkar and Bard did not reach a settlement of the two lawsuits. He is further precluded from claiming that he did not understand, agree to or authorize the settlement of the two lawsuits. Although Dr. Mahurkar did not claim in his supplemental brief that he intended to make such claims, there was some previous confusion between the parties on this matter that might not have been cleared up by the supplemental briefs and, accordingly, it warrants a clear statement of the issue.

Dr. Mahurkar's claims regarding whether Niro "tipped" Mr. Grimm to the settlement, assisted him in enforcing such settlement and spoilated evidence were not litigated in 1997 and there is nothing in my explicit rulings to preclude him from making these claims in state court. The more difficult issue is whether he is precluded from raising the claims because he did not raise them when he challenged the enforcement of the settlement. One can see why he would not raise these matters before me. The claim is inherently weak in its causation component—it borders on the ridiculous to suppose that Mr. Grimm would need the assistance of Mr. Niro to inspire him to seek to enforce the settlement. It was in Bard's interest to enforce the settlement. It is also difficult to believe that Mr. Grimm would require the assistance of Mr. Niro to devise arguments to advance his position that the case was settled. On the other hand, the evidence would have been useful to show that Mr. Niro was not faithful to his former client and therefore not to be believed when he said that a settlement had been reached. In the end, I conclude that Dr. Mahurkar cannot be precluded from raising these matters in state court. Dr. Mahurkar's failure to raise it is not the equivalent of a failure to offer a defense or to make a claim, it

is merely a failure to use evidence that might have helped him. He is not precluded from using it in another case based upon a different theory. It is for the state court to determine whether the causation aspect of the state claim is strong enough to justify its submission to the trier of fact.

Finally, in connection with Dr. Mahurkar's theory that he is entitled to seek attorneys' fees and enhanced damages because he would have been awarded them had the settlement not been enforced, I find nothing in my 1997 Rulings to prevent him from using this as a measure of damages against Niro (assuming he sustains a malpractice claim against Niro). I recognize that I know, at least in part, the answer to these questions: what fees would have been awarded [4] and whether enhanced damages would have been awarded and, if so, in what amounts. I do not answer these questions because, under our legal structure, if liability is established, those questions are properly answered by another judge or a jury that will tell both Dr. Mahurkar and Mr. Niro (and, indirectly, me) what it was I would have done. It is one of the wonders of the law.

Niro's motion to enjoin further proceedings by Dr. Mahurkar inconsistent with this Court's July 10, 1997 judgment is GRANTED in part and DENIED in part.

Niro's motion for clarification of the Court's Memorandum Opinion and Order is GRANTED.

James B. Zagel
United States District Judge
DATE: 5-10-02

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[4] I had ruled that Dr. Mahurkar was entitled to some portion of his fees though I had expressed a provisional view (which is dicta) that not all of the fees should be paid.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. SAKHARAM D. MAHURKAR,) Civil Action No. 96 C 1871
Plaintiff,) Honorable James B. Zagel

vs.

C.R. BARD, INC.,
Defendant.

DR. SAKHARAM D. MAHURKAR,) Civil Action No. 92 C 4803
Plaintiff,) Honorable James B. Zagel

vs.

C.R. BARD, INC., D/B/A DAVOL,) Chicago, Illinois
Defendant.) Thursday, April 11, 2002
10:15 o'clock a.m.
Room 2103

REPORT OF PROCEEDINGS BEFORE THE
HONORABLE JAMES B ZAGEL

THE CLERK: 92 C 4803 Mahurkar versus Bard 96 C 1871, Mahurkar versus Bard.

MR PFLAUM: Good morning, your Honor, Steven Pflaum for Dr Mahurkar.

MR VICKREY: Good morning, your Honor, Paul Vickrey for the movant. I apologize for being tardy.

THE COURT: I have read these briefs. I have one comment to make and I am not reluctant to make this comment.

The debate I had with myself is whether I ought to put it in writing and publish it; I decided not to do so.

To some extent, Dr. Mahurkar's brief is an offense against civility. The language in it I regard as extraordinary. It really doesn't do you much good to refer to the opposing party as a "schoolyard bully." I was also struck by footnote six which characterizes Mahurkar as "a vulnerable Indian immigrant layman with serious haalth problems and English is his second language." I heard Dr. Mahurkar in this case. I would not call him vulnerable. He is a man I think, who has many millions of dollars. He is highly educated, and although English is quite clearly his second language I saw him spend two days, perhaps more, on the witness stand charming a jury of native English speakers and he didn't use a translator.

I also am not pleased at the argument made which relies heavily on the personal merits of the State Court Judge in this case. An assessment of his personal merits in which I am not in disagreement, as might be apparent to both of you in Judge Preston's comments, and mine today. Judge Preston and I have known each other for many years, from the time he served in the State Legislature and when I was an officer of the State of Illinois. But the truth of the matter is these rules which require deference and comity require deference and comity even if the State Court Judge is an idiot. So it doesn't make the case any better if it is Judge Preston or if it "Judge Idiot."

There is, however something that requires further briefing on this, and it will be fairly short in nature. In the way of getting to it I am going to clear away some of what I regard as underbrush. It may very well be that what I regard as underbrush some higher Court might regard as crucial, but I think of it as underbrush.

I think all of the procedural arguments against the entitlements of movants, which I will call the "Niro movants"

failed. I believe Dr. Mahurkar is bound by the factual findings that I made. I don't think they are too late in filing them. This would be, perhaps, a stronger argument if we were not faced with a case in which the movants here had asked for me to bring the state proceedings to a complete halt. And there are, actually, long passages in Dr. Mahurkar's brief that seem to operate on the premise that that is what they asked for, and it is quite clearly not what they have asked for

What they are basically asking is for me to enjoin Dr. Mahurkar from taking certain positions on certain matters in the State Court, which they have laid out in table format in Exhibit V as in "Victor" in their reply. I believe at least to some extent, they are entitled to an injunction. But because of the nature of the briefing in this case, and because of the procedural issues which were raised—and I don't blame them for being raised. I am troubled by the language which was used but the fact that they were raised is perfectly appropriate.

There was too little time and effort directed towards the question of what it was that Dr. Mahurkar actually wants to say in State Court and whether or not what he wants to say is barred by my factual findings. So I am going to insist on additional briefing on a very short schedule because I would like to reach a conclusion in time for Judge Preston to be aware of it, usefully aware of it; the morning of trial is not useful.

That is, essentially, the issue that I wanted addressed, and it should be addressed in contexts, but only one is necessary for me. The other is the advice to counsel as to how they want to proceed.

The context that must be dealt with is the question of what it is that Dr. Mahurkar is barred from saying in Court. The positions he is barred from taking in State Court. With respect to this I want Dr. Mahurkar to file the first brief by

next Tuesday. I want the Niro movants' response by the Monday after that.

The other context which is something that I noted before in reading the brief but I have not commented on until this moment is I am not precisely sure what the purpose of this motion is. In reading these papers I am wondering how it is that Dr. Mahurkar gets to his position today which may very well be in State Court.

I did settle the case but did so as a result of malpractice—from his position before me which is did not settle the case some years earlier. Much of which Dr. Mahurkar has to say with respect to what occurred in this Court, is evidence which for all I know the Niro movants would actually affirmatively introduce into the State Court proceedings because they represent certain inconsistencies in Mahurkar's views.

But that is for the lawyers to deal with. If I enter an injunction, which it appears that I will, it is for Judge Preston to decide, if the Niro movants want to introduce part of the evidence that I have enjoined, whether it is a fair thing in context of the State trial to allow the Niro movants to select some parts of the injunction to waive and preserve others

Lastly, the argument that the Niro movants make that I find unpersuasive and this is relevant to the nature of the injunction, the argument that what Mahurkar seeks in State Court are damages under patent law. Or Mahurkar's answer to this seems to me to be persuasive. His answer, as I understand it is the damages are for malpractice. The measure of damages is to be found in the patent case and quite clearly, I think and quite consistent with the rulings that I have made in this case is that he would be entitled, for example, to take the position that he did settle the case—he is not disputing that he settled the case, but he got very bad advice and one measure of damages which I think is clearly

available to him is whatever the attorneys' fees might be, because I have expressed my view on that.

There may be a subtler question to be addressed as to whether the other form of damages, the exemplary damages, the further damages that are called for that are part of Mahurkar's theory in State Court are, in fact, in the context of this case, available to you. So that issue, too, is to be addressed.

To recap: I want Dr. Mahurkar in the next brief to address what it is that. they think is wrong with Exhibit V—as in "Victor"—attached to the reply; to specify what it is they do intend to do in State Court that they regard as consistent with my ruling and to address the question of the appropriateness of one of the two measures of damages, that is the nonattorneys' fee aspect of damages in the context of my ruling. The Niro movants can respond to that.

You can infer that necessary to my statements today is the fact that I have concluded that the Niro movants are entitled to some injunctive relief and that all that is left is the scope of it. That should be noted for the record, so that I don't wind up with a bunch of extra pages, that I will not regard Dr. Mahurkar's briefing on the question which I have raised as a waiver of any of his objections to the injunctive relief in the first place.

So you don't have to reargue it. You can just open your brief by saying—operating on the assumption that they are entitled to it—an assumption to which we object. Before they are entitled to some relief this is what they are stuck with—or, I suppose you can argue that it is nothing, they are entitled to nothing, but I think that that would not likely carry the day.

I will probably enter a written ruling on this, or I will make a statement in open Court as to my precise basis, because obviously it may be of some use to Judge Preston.

With that, we are done.

MR. VICKREY: Thank you.

MR PFLAUM: Your Honor. I have tried to take good notes. I think I have taken pretty good notes of what you have said today, perhaps with the help of looking at the transcript. I know I need to file the brief by Tuesday, so I am hoping.

THE COURT: Mr Lisanti will, I'm sure, provide it to you very quickly.

MR PFLAUM: Thank you, your Honor.

MR VICKPLEY: Thank you, your Honor.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. SAKHARAM D. MAHURKAR,) Civil Action No. 96 C 1871
Plaintiff,) Honorable James B. Zagel

v.

C.R. BARD, INC.,
Defendant.

DR. SAKHARAM D. MAHURKAR,) Civil Action No. 92 C 4803
Plaintiff,) Honorable James B. Zagel

vs.

C.R. BARD, INC., D/B/A DAVOL,)
Defendant.)

JUDGMENT ORDER

These two matters coming before the Court on defendant, Bard's Inc.'s., motion to enforce settlement agreement. The Court after conducting a full evidentiary hearing, having heard evidence and witnesses thereon, and having reviewed the parties' written submissions, hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. This Court had jurisdiction over the parties and subject matter of both Civil Actions.

2. United States Patent No. 4,808,155 (the "'155 patent") entitled "Simple Double Lumen Catheter", owned by Dr. Mahurkar, was found valid and infringed in Case Number 92 C 4803.

3. Bard filed a motion to enforce settlement agreement alleging that a settlement was reached by the parties, through authorized attorneys, in June 1996 to resolve both matters pending before this court.

4. After consideration of written submissions from both parties and after full evidentiary hearing on the merits of Bard's motion to enforce settlement agreement, this Court finds that the parties, through authorized attorneys, reached a settlement agreement in June of 1996 to settle both matters pending before this Court. This settlement agreement includes an agreement to enter an Agreed Order and also includes a license agreement between Dr. Mahurkar and Bard. The terms of the settlement agreement are set forth in an Agreed Order and License Agreement signed by Dr. Mahurkar and his attorney on June 24, 1996. This Court's factual findings and decision relating to Bard's motion to enforce settlement was set forth in an oral ruling in open court on June 19, 1997.

5. Accordingly, the Court enters this Judgment Order nunc pro tunc to June 24, 1996.

6. Bard has represented that its sales of the accused product in both catheter and kit form, from October 15, 1994 through May 31, 1997 has been $14,544,214. Based upon that representation, Bard shall pay Dr. Mahurker $4,824,393 to which represents a royalty of 25.88% with prejudgment interest in the amount of $255,174.57.

7. Dr. Mahurkar shall have the right to conduct an independent audit at his expense to confirm the accuracy of Bard's representation of the volume of its sales of the accused product within 90 days of the date of this Order. If such an audit shows a discrepancy in the amount of sales represented by Bard, Dr. Mahurkar shall have the right to seek relief before this Court to adjust the amount due him based upon a 25.88% royalty and the appropriate prejudgment interest rates.

8. Pursuant to the parties' settlement agreement, Bard agrees to accept, and Dr. Mahurkar agrees to grant, a license to Bard under the '155 patent for the life of the patent The terms of this license agreement are set forth in the license agreement signed by Dr. Mahurkar on June 24, 1996 and signed by Bard on December 12, 1996.

9. All claims and counterclaims of the parties in both matters are hereby dismissed with prejudice.

10. Plaintiff's motions for summary judgment on infringement, willfulness, increased damages and attorneys fees are hereby denied as moot.

The Court's July 24, 1996 order granting Plaintiff's motion for recovery of attorney's fees is hereby vacated. Plaintiff's Motion For Recovery Of Specific Attorneys' Fees As Allowed By This Court's Order In Its July 24, 1996 Order is hereby denied as moot. Each party shall bear their own attorneys fees.

12. Each party shall bear their own costs.

13. This Court shall retain jurisdiction over the parties for the purpose of enforcing this.

Dated: 10 July 1997 /s/ James B. Zagel
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. SAKHARAM D. MAHURKAR,) No. 96 C 1871
Plaintiff,) Chicago, Illinois
June 19, 1997
12:15 p.m.
Motion Hearing/Ruling

v.

C.R. BARD, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For the Plaintiff: ARNOLD, WHITE & DURKE, by
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For the Defendant: WINSTON & STRAWN, by
MR. RAYMOND C. PERKINS
MR. TERRY M. GRIMM
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WANDA L. BARNES, CSR, RPR
Official Court Reporter-U.S. District Court
219 South Dearborn Street
Room 2102
Chicago, Illinois 60604
(312) 435-5568

THE CLERK: 96 C 1871, Mahurkar versus C R. Bard.

THE COURT: I have read the post-hearing memoranda, both sides. I have reread actually most of the briefs that were filed before this time, and I have looked more than once at each exhibit.

Does anybody have any last words?

MR. PERKINS: I don't know if that's a good sign or a bad sign.

MR. GRIMM: Do you have any questions, Your Honor?

THE COURT: No. If I had only looked at the exhibits once, I might have had a question. Had I only read the closing argument portions once, I might have had a question. But I read them more than once.

The reason I read them more than once is that this case is not free from difficulty and both sides have something to say.

I sometimes wonder whether we haven't done ourselves a disservice by instructing all lawyers, as we do instruct pretty much all lawyers, to write briefs which say clearly my side wins as opposed to saying, gee, it's a really close case, but on balance we think we win. If our ethos had been to write it in the second way, I suspect that the briefs from both sides would have adopted that tone.

But I will make my ruling now. It is an oral ruling. I am speaking from notes. The ruling is not short, but it's not that long. If you want to sit, you can.

I find there was an agreement here. All that was at issue—and I use "issue" in a special way here—was the meaning of what I regard as a relatively minor aspect of the agreement covering a contingency that might never occur and the two lawyers agreed on what that clause meant.

One proposed greater specificity in the language and the other consented. Neither thought there was any change in the agreement. Bard's attorney disagreed with what he mistakenly thought was Mahurkar's interpretation of certain language. He did not disagree with the true meaning.

In any event, so far as I can tell from the papers, the ultimate bone of contention over the meaning of section 3 B and what it might mean strikes me in the context of this to be inmaterial. There is, at most, a dispute over one clause, an inchoate dispute because we do not know whether the event which triggers the clause will ever occur, which is termination of the license, in my view, during the middle of a contract year or some part of a contract year.

The reason this is inchoate is not only do we not know whether the event will occur, we do not know whether Bard will refuse to comply with the interpretation of the contract, and, indeed, the possible interpretation of the contract is one which we do not know whether Dr. Mahurkar will adopt, and that has to do with whether if the license is terminated in the middle of a contract here, whether the entire annual minimum royalty is due or has to be prorated.

In the context of this agreement as a whole this potential disagreement is inmaterial. Absolute clarity of every possible contingency is not a requirement of contract. It is, in fact, impossible to achieve. And that is assuming there is disagreement. I have already indicated that I believe that even the meaning of that clause was agreed upon, although I'm not ruling that for reasons which I will state in a moment.

After the lawyers' discusion as to the meaning of section 3B, there was a lot more communication and many letters, but all that goes on after Dr. Mahurkar's told about the discussion of the meaning of this section is in fact not discussion about settlement of the underlying dispute, it is discussion in fact about the settlement of a possible motion to enforce the settlement.

There is no question that what occurred here is not the ordinary course of an agreement, which was the witness Mayer's conclusion, and to the extent that that's his conclusion, the conclusion is in my view quite true.

It is also his premise for the further conclusion that there was no agreement at all, but to say something is nonstandard is not the same thing as to say that it did not occur. To say that a process was nonstandard in reaching agreement is not the same thing as saying there was no agreement.

As my opening remarks indicated, there is no question that what occurred here is worth a close look, indeed, the very reason for the hearing. Both sides have made decent arguments. Neither the arguments, nor the various documents and timetables offered by the parties compel a conclusion. The witnesses had to be heard, and the reliability and accuracy of their testimony had to be determined.

If I believe the witnesses Niro and Grimm, there is an oral agreement, the terms of which were embodied in a written document signed by Dr. Mahurkar.

I do not think that the June 24 paper signed by Dr. Mahurkar was an offer which Bard then rejected. The agreement was made before the time the paper was sent, indeed, before the time probably the paper was created.

I don't mean by saying this that I regard the document as insignificant. I think both parties would have preferred that their agreement be embodied in a written document signed by both parties, but the agreement existed without it, and I find that an oral settlement of a patent litigation, the effect of which is to grant a patent license, is permissible.

I find nothing, incidentally, that indicates that the practice of both Mr. Grimm and Mr. Niro is conferring with their client diminishes or precludes the finding that they had authority to make the settlement that they did make. Granted

authority is neither in my view augmented nor diminished by the absence of consultation or the presence of consultation of the client on the details or even on every detail.

Which brings me to the basic point, which is the credibility judgment. I believe Mr. Niro and I find that Dr. Mahurkar did give general authority and, indeed, specific authority to enter into the agreement that Dr. Mahurkar signed. The clearest indication of the grant of authority, other than the testimony of Niro, is the fact that Dr. Mahurkar signed the document which embodied the oral agreement.

The history of the deal shows that the life of patent conditions asserted by Dr. Mahurkar was abandoned by him on June 24th after having previously been asserted. And I believe that Mr. Grimm had authority to accept the agreement and did so.

Indeed, there was a basic agreement on all terms by June 15th except for the life of patent minimum payment condition. Dr. Mahurkar's abandonment of this corroborates the fact of Bard's acceptance.

I reiterate that it is not the papers here that decide this case; it is my assessment of the credibility of the testimony that I heard, the testimony of honorable and distinguished men.

I note that in deciding to reject Dr. Mahurkar's version of events as it conflicts with Mr. Niro's version, I do not find that Dr. Mahurkar has deliberately lied to this court. I simply do not trust the accuracy of his memory of events in this regard. I find that he changed his mind, and with that his memory was changed as well.

It is true that Mr. Niro may have some bias because of his contract dispute with Dr. Mahurkar, but I do not think it led him into mistaken recollection of the facts or a deliberate misstatement of the facts.

To the extent that Mr. Grimm had a personal interest in this matter, which in theory is a source of bias, it's difficult to assess exactly what his interest might be because his interest might very well be served by prolonging rather than shortening this litigation.

I reiterate again that this is not a case in which the testimony and the exhibits present a seamless web supporting only one result. There is, as Dr. Mahurkar's counsel pointed out, language in some documents which is suggestive that the settlement had not been reached. There is language about settlements to be made rather than those already made.

But I find, as I have said before, that this was an attempt to settle the settlement dispute and not an attempt to settle the underlying case, an attempt to reach true peace rather than a judicial enforced peace.

There is the note of the telephonic message from Mr. Grimm, but its content and the correct nature of its transcription I find to be doubtful, and I find that Mr. Grimm's account of the substance of what he intended to convey in that telephone message is correct.

I find as a matter of fact that neither Dr. Mahurkar or Bard insisted on a written document signed by both sides. At most, Dr. Mahurkar insisted that he sign before there was an agreement, and he did sign, and I find that he did understand the material meanings of what it is he has signed.

Mr. Niro had authority to enter into this settlement. He says he did; I believe him. Circumstance and his conduct support this as well as the nature of the agreement known to and approved bt Dr. Mahurkar.

Most importantly from Bard's perspective, he clearly acted within his authority. They had not only his word and the course of conduct of the litigation to back this up, they had Dr. Mahurkar's written approval of the terms of the deal.

Even Dr. Mahurkar understood this in his testimony when he said, and I quote, "I signed it. I settled it. There is no question about authorizing the attorney."

I also find that Dr. Mahurkar did understand the agreement he had entered. I am willing to accept that his consent and agreement was reluctant; it was, nonetheless, consent and agreement.

I find that Mr. Grimm had authority to accept it. Bard knew what he was doing, and Bard told him to settle the case.

In conclusion, I find there was an agreement for settlement of this case, that it was properly understood by both parties, and that it is enforceable and in equity and law ought to be enforced.

I grant the motion to enforce the settlement agreement as memorialized in the June 4th document signed by Dr. Mahurkar, which I regard as a memorialization of an agreement. I decline to decide the precise issue of the meaning of section 3 B because to do so would be giving an advisory reading.

The minute order shall read for the reasons stated in open court the motion to enforce the settlement agreement is granted.

I give leave to Bard to amend its pleadings to conform with the proofs. Bard shall prepare and serve upon Dr. Mahurkar within seven days a draft order of judgment. The parties shall appear on June 27th at 10:00 a.m. to discuss the form of that order.

Thank you, counsel.

Mr. Grimm: Thank you, your Honor.